ERNEST J. BROOKS, III, T-61049
C.S.A.T.F. E3-143L
P.O. BOX 5242
900 QUEBEC AVENUE
CORCORAN, CA 93212-5242

In Propria Persona

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ERNEST J. BROOKS, III,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

CASE NO: 08cv0125 JM (BLM)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S TRAVERSE TO RESPONDENT'S ANSWER TO PETITIONER'S HABEAS CORPUS PETITION.

I.

INTRODUCTION

Petitioner, Ernest J. Brooks, III, is challenging his 2002 conviction on two Counts of committing lewd acts on two children under 14 years old (Cal. Pen. Code, Section 288(a), counts 1 and 5); and one count of lewd acts on a child 15 years old (Cal. Pen. Code, Section 288(c)(1), count 8); and special findings that the offense was committed against more than one victim, within the meaning of Cal. Pen. Code, Section 667.61(b)(c)(e).

Petitioner contends that his right to due process and right to a fair trial was violated when the Trial Court violated its own pre-trial order, when it failed to sustain a defense objection to testimony by a (Cal. Evid.

Code, Sect.) 1108 witness, regarding sodomy and/or anal penetration, which had been prohibited, pursuant to the Court's own (Cal. Evid. Code, Section) 352 analysis. Petitioner argues that the prohibited testimony was prejudicial.

Petitioner prays that this Court grants an evidentiary hearing and appoint counsel on behalf of Petitioner, for further consideration and determination to vacate his conviction and remand for a new trial.

STATEMENT OF THE CASE

The Prosecutor's case is adequately stated in Respondent's Brief, with the following exceptions noted:

Page 3, 8-13.

On direct appeal, Petitioner argued that: (1) the trial court erred in allowing the prosecution to present evidence of prior acts of child molestation, without limitation, which was a pre-trial order of the court; (2) insufficient evidence supported the verdict, and; (3) the court abused its discretion in imposing consecutive 15-years-to-life terms.

STATEMENT OF THE FACTS

11-year old Antoine O.

Petitioner was charged with 1 count related to this Minor. The Prosecutor's case is adequately stated in Respondent's Brief.

13-year old Marq M.

Marq is Antoine's older brother. Petitioner was charged with 3 counts related to this Minor. The Prosecutor's case is adequately stated in Respondent's Brief. The Jury was unable to reach a verdict on any of the counts related to this Minor.

13-year old Clarence H.

Petitioner was charged with 1 count related to this Minor. The Prosecutor's case is adequately stated in Respondent's Brief.

15-year old Orlando F.

Petitioner was charged with 3 counts related to this Minor. The Prosecutor's case is adequately stated in Respondent's Brief. The Jury failed to reach a verdict on two of three counts related to this Minor.

Testimony of Sharon Young.

During direct examination, Prosecution witness Sharon Young, who is the Mother of Antoine O. and Marq M., testified that several months prior to Petitioner's trial, she had hired a civil attorney, in order to sue Petitioner for "molesting my sons." (2 RT 345.) Ms. Young also testified that she had discussed her intentions with her sons, prior to the trial.

[Evidence Code] 1108 Witness Testimony.

The Prosecutor also presented the testimony of Three (3) adults, who testified Petitioner had molested them when they were minors. (3 RT 469-79, 594-602, 643-48.) The Defense objected to the introduction of the testimony of these witnesses, arguing that Petitioner was innocent of the allegations. Petitioner also argued that these allegations would be "thoroughly tried now" in the current case, where there had been no previous criminal charges brought against him before. (1 RT 11-12).

The Defense Case.

Testifying on his own behalf, Petitioner denied that he did anything improper to any of the minors. Petitioner presented testimony that the minor's were friends, (Antoine and Marq were brothers) and that they had frequently discussed the case among themselves and with other prosecution witnesses. Petitioner further presented testimony of numerous boys and girls who had worked for a Non-Profit Corporation that Petitioner ran, and had

participated in sleep-overs, each of whom testified that nothing inappropriate had ever occurred between them and Petitioner. (4 RT 747-58, 812-16, 851-57, 883-85.) In addition, Petitioner called several witnesses who offered testimony showing that the four alleged child victims had frequently lied, engaged in other forms of misconduct (including sexual misconduct), and had previously made inconsistent statements to police and social workers, about the nature of the "touchings". (4 RT 758-77, 787-92, 800-04, 818, 829-34, 851-52, 865-67, 893-900, 952, 981-82.)

Federal Question Now Before This Court.

The Federal question now before this Honorable Court is whether Petitioner received due process and/or a fair trial after the trial court allowed the jury to hear testimony of anal penetration, from an 1108 witness, that was previously prohibited, pursuant to a [E.C.] 352 analysis.

A R G U M E N T

I.

FEDERAL HABEAS CORPUS PRINCIPLES

(STANDARD OF REVIEW)

Petitioner agrees that the Respondent's "Standard of Review" contains an accurate summary of the governing law regarding the deference due under the AEDPA to State Court adjudications on the merits. On the other hand, Respondent omits entirely from its discussion at this juncture in the litigation - the standard this Court must apply in deciding whether or not to grant Petitioner an evidentiary hearing on his (Federal) Habeas Corpus claim.

A Petitioner, on Federal Habeas Corpus, is entitled to an evidentiary hearing where the Petitioner establishes a "colorable" claim for relief, and where the Petitioner has never been accorded a State or Federal hearing on the claim. Earp v. Oronski, 431 F.3d 1158, 1167 (9th Cir. 2003)

citing Townsend v. Sain, 372 U.S. 293 (1963) and Keeney v. Tamayo-Reyes, 504 U.S. 1, 5, (1992). In stating a "colorable" claim, a Petitioner is merely required to allege specific facts which, if true, would entitle him to relief. Ibid. Granted, under AEDPA, a Federal Court is not required to order a hearing where the Petitioner failed to develop the facts in state court. In such cases, the Federal Court accords a presumption of correctness, to the facts found by the state court, and need not hold any evidentiary hearing, unless those facts are rebutted by clear and convincing evidence. On the other hand, no AEDPA deference is due where the State has made an "unreasonable" determination of the facts. Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004).

In sum, an evidentiary hearing is required under the AEDPA - and an Appellate Court will remand for a hearing if the State Court rules without granting one - where the Petitioner establishes a "colorable" claim for relief and has never been accorded a State or Federal hearing on his claim. Earp, Supra, at 1167.

Here, Petitioner requested an evidentiary hearing at every stage of his state habeas proceedings, and each of the courts to which he applied, ruled without granting one.

Simply put, the fact-finding procedure employed by the state Court did not adequately provide a full and fair hearing. Therefore, (1) Petitioner is entitled to an evidentiary hearing in this Court, before the Court can make any credibility determinations on the facts alleged in the instant Federal Petition and supporting exhibits; and (2) Any controverted "facts" found by the State Court while denying a request for an evidentiary hearing necessarily resulted from an "unreasonable determination" of the facts, and hence are not entitled to any presumption of correctness. Earp, Supra, at 1167; Taylor,

Supra at 1101 ["Where the state court's legal error infects the fact finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it."]

II.

THE RESPONDENT'S ARGUMENT IS MISPLACED BECAUSE PETITIONER IS NOT ARGUING THE BROADER ISSUE OF 1108 PROPENSITY EVIDENCE, RATHER, THE NARROW ISSUE OF THE APPLICATION OF SECTION 352 ANALYSIS.

Respondent contends that the United States Supreme Court has not held that propensity evidence violates due process, thus, there is no applicable controlling United States Supreme Court precedent regarding propensity evidence, therefore, this Court cannot grant Habeas Corpus relief.

While this argument may be valid, it does not apply in this case because Petitioner is not contesting the admission of the evidence (pursuant to Section 1108.) Rather, Petitioner is contending that the failure to sustain the Defenses objection to (1108 Witness) Cortez' testimony, that was previously prohibited by a [E.C.] Section 352 analysis, was prejudicial and violated his due process rights and right to a fair trial.

A. The Record in the State Trial Court

The Record of the State Trial Court proceedings in this case are adequately stated in Respondent's Brief.

B. The State Appellate Court Opinion

The State Appellate Court Opinion is adequately stated in Respondent's Brief.

C. While The United States Supreme Court Has Not Held That Propensity Evidence Violates Due Process, The Court Has Made It Clear That The Safeguards Of Federal Rule 403, Against Abuses Of Rule 414, Is What Enables Rule 414 To Successfully Defend Against Constitutional Challenges.

Petitioner agrees with Respondent in its analysis of Federal Rule of

Evidence 414 and 403, and its co-relation to California's Evidence Code Sections 1108 and 352. Petitioner further agrees with Respondent's analysis in United States v. LeMay, 260 F.3d 1018, 1027, (2001). In part, Petitioner adopts the same argument.

California's [E.C.] Section 352 gives the Trial Judge broad discretion to exclude evidence when its probative value is substantially outweighed by its prejudicial effect, and/or to ensure that evidence admitted under [E.C.] Section 1108 will not infringe on the right to a fair trial guaranteed under the due process clause. In the Federal Court, Rule 403 is the sole protection against abuses of Rule 414. In California, [E.C.] Section 352 is the sole protection against abuses in Section 1108.

In this instant, and in his direct appeal, Petitioner argued that the Trial Court violated its own pre-trial order, when it failed to sustain a defense objection to testimony from (1108 witness) Cortez H., that had been previously prohibited by the pre-trial order. The Court had properly weighed the proposed 1108 testimony, under [E.C.] 352 analysis, when it made the pre-trial order. While the Court may have misinterperted the (prohibited) testimony, (in overruling the the defenses objection) it was clear that the testimony had been previously "limined-out".

The Fourth District Court of Appeals ruling (D040566) addressed the broader issue of whether the prior acts evidence was relevant as propensity evidence under section 1108.

The Appellate Court did make an attempt to address the narrow issue of allowing the admission of testimony (that included allegations of sodomy and/or anal penetration), that Petitioner had argued was a violation of the trial court's pre-trial order. The Court even agreed that "the Trial Court's failure to sustain defense counsel's objection was inconsistent with its

pretrial ruling", (See Respondents Memorandum of Points and Authorities in Support of Answer to Petition for Writ of Habeas Corpus at p. 16, 16-18). However, the Court ruled that the "error" was not prejudicial. Petitioner disagrees. First of all, what the Appeal Court actually did, was create their own objection to the Trial Court's pre-trial ruling, which is not allowed where there was no objection by the prosecutor when the Court allowed the 1108 testimony to be admitted but imposed strict parameters in the Prosecutors Case in Chief. Secondly, the Trial Judge is the only person entrusted to make this determination because they are in the best position to evaluate the evidence.

Here, the Respondents also claim that even if there was error, it was harmless. Not true.

In the pre-sentence probation report, adopted by the Court, the probation officer argued for a maximum sentence based, in part, on the "uncharged crimes" that were committed against the adult "victims". It is quite probable that the jury sought to punish the Petitioner for those "uncharged crimes" as well. Therefore, it cannot be said, with any certainty, that this "error" was harmless.

Since his arrest, Petitioner categorically denied molesting any of the minors in the current case, or any of the adult witnesses who testified that they were molested by Petitioner when they were minors. It is clear that the reason the Trial Court imposed the strict parameters of the 1108 testimony, was to safeguard Petitioner's right to a fair trial, because there was never any argument that the testimony of the 1108 witnesses would be time consuming or that their testimony would confuse the issues or the jury.

The Court, in People v. Falsetta, 21 Cal. 4th at 916, 918, ruled that when admitting prior sex offenses, the trial court must carefully weigh the evidence under section 352 to safeguard the defendant's rights. The Court

outlined the purpose of [E.C.] Section 352, when it stated that Section 352:

> (1) Relieves the defendant of the often unfair burden of defending against both the charged offense(s) and the other uncharged offense(s);
>
> (2) Promotes judicial efficiency by avoiding protracted "mini-trials" to determine the truth or falsity of the prior charge, and;
>
> (3) Guards against undue prejudice arising from the admission of the defendant's other offenses.

In a concurring, but separate opinion, Justice **MOSK** wrote:

> I write separately because I am concerned that the Majority leave open troubling questions. What is the procedure if a Defendant pleaded not guilty to the previous offenses? or pleaded guilty, or nolo contendre, but now alleges that he was not, in fact, the perpetrator? I question the Majority's conclusion that Defendants in such circumstances "will not be burdened unduly by having to 'defend' against these charges." (Maj. Opn., Ante, 89 Cal.Rptr.2d at p. 860, 986 p. 2d at p. 194.) Nor, in such circumstances, would judicial efficiency be served. The Majority, on this point, again emphasizes that in cases like the present circumstance, in which the Defendant pleaded guilty, there is no danger of "inefficient sidetracking." (Ibid.) But what of other cases, when there was no such prior guilty plea and, perhaps, no conviction? Must there be a trial within the trial to ascertain the prior facts? As to the issue of undue prejudice, I am concerned that, under the Majority's analysis, the "careful weighing process" under Evidence Code Section 352 would appear to exclude, in every case, the long standing principal that use of the prior offenses to show "propensity" may itself be highly prejudicial.

Petitioner contends this case mirrors the concerns that Justice MOSK wrote of, in his (concurring) opinion. Petitioner denied molesting any of the Minors in the current case. Petitioner also denied that he molested any of the [E.C. 1108] Adult Witnesses (when they were minors), and noted he had never been charged with and/or convicted of any previous sex offenses or crimes related to them. Petitioner found himself in a position to have to defend himself against the current charges as well as the past allegations. [E.C.] 1108 Witness, Antoine H., testified that Petitioner had molested him on

a daily basis, from between 6 months to a year, when he was a minor, and lived with Petitioner. While the allegations were investigated by police, no charges were ever filed against Petitioner. Petitioner contends that it is highly probable that the Jury, through its verdict, sought to punish Petitioner for the "uncharged" crimes as well.

The [E.C.] Section 352 safeguard, is what allows the [E.C.] Section 1108 to successfully defend against Constitutional challenges and must be protected.

CONCLUSION

This Habeas Corpus Petition is not intended to set forth all of Petitioner's legal arguments and/or issues. It is only intended to set forth a prima facie case for relief, so that the Court can make a further determination to appoint counsel on behalf of Petitioner, in order to ensure a full and fair presentation of his claims, now before the Court.

WHEREFORE, for the foregoing reasons stated herein and in the Petitioner's Traverse, and more fully in Petitioner's Federal Habeas Corpus Petition, Petitioner respectfully prays that this Court issue an Order **GRANTING** Petitioner an Evidentiary Hearing, and **APPOINT** Counsel on behalf of Petitioner, for further determination to vacate his conviction and remand for a new trial.

Dated: August 12, 2008

Ernest J. Brooks, III, Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PROOF OF SERVICE BY MAIL

CASE NAME: **BROOKS v. CLARK** CASE NUMBER: **08cv0125 JM (BLM)**

I, Ernest J. Brooks, III, hereby declare as follows:

I am 18 years of age and a party to this action. I am a resident/inmate at the California Substance Abuse Treatment Facility & State Prison, in the City of Corcoran, County of Kings, State of California. My prison address is: P.O. BOX 5242, 900 Quebec Avenue, Corcoran, CA 93212.

On 8/12/08, I served the attached:

TRAVERSE TO RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S TRAVERSE TO RESPONDENT'S ANSWER, on the above captioned party, by placing a true and correct copy thereof, enclosed in a sealed envelope, with postage fully pre-paid, thereon. The envelope was then addressed as follows:

ELIZABETH A. HARTWIG, (SBN 91991)
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
110 West A STREET, SUITE 1100
SAN DIEGO, CA 92101

I then presented the envelope to the Correction Officer, for deposit in the United States Mail Receptacle, so provided at the above named correction facility, in accordance with Institution Mail pick-up policy and procedures.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Dated: 8/12/08, at 2030 hours, by

Ernest J. Brooks, III, Declarant

PROOF OF SERVICE BY MAIL